

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

November 23, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: June 29, 2004

Case Number: TSO-0129

This Decision concerns the eligibility of xxxxxxxxxxxx (hereinafter "the individual") for continued access authorization. The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual's suspended access authorization should be restored. For the reasons detailed below, it is my decision that the individual's access authorization should be restored.

I. BACKGROUND

In May 2004, the Manager of the Personnel Security Division, National Nuclear Security Administration (NNSA), Department of Energy (DOE) issued a Notification Letter to the individual, stating that the DOE was in possession of derogatory information that created a substantial doubt concerning his continued eligibility for access authorization. In the Notification Letter, the Manager also informed the individual that he was entitled to a hearing before a hearing officer in order to respond to the information contained in the Notification Letter. The individual requested a hearing in this matter and the NNSA forwarded this request to the Office of Hearings and Appeals. I was appointed to serve as the hearing officer. In accordance with 10 C.F.R. § 710.25(e) and (g), I convened a hearing in this matter (hearing).

The Notification Letter finds security concerns related to the individual's behavior under Criteria F and J. 10 C.F.R. § 710.8(f) and (j). Criterion F security concerns generally relate to falsification or misrepresentation of significant information from a security questionnaire or during a security interview. Criterion J security concerns relate to the use of alcohol habitually to excess or a diagnosis of alcohol abuse or dependence.

The Notification Letter indicates that the Criterion F security concern is based upon the individual's failure to disclose two criminal charges on his October 2002 Questionnaire for National Security

Position (QNSP). The first was an October 1998 citation that the individual received for being a minor in possession of alcohol. The second was an October 1999 citation for “public affray.”

The Notification Letter bases the Criteria J security concern on the DOE consulting psychiatrist’s August 15, 2003 written evaluation of the individual (August 2003 psychiatric report). That report concluded that the individual meets the criteria for a diagnosis of alcohol abuse. This diagnosis of alcohol abuse was primarily based on the individual’s four alcohol-related legal problems. In 1996, when the individual was 18 years old, he was arrested for DWI. In October 1998 he received a citation for being a minor in possession of alcohol. In October 1999, the individual received a citation for “public affray.” In December 2000 he was again arrested for DWI.

At the hearing the individual testified on his own behalf, and he presented the testimony of his wife, his sister, his brother in law, his father in law, a co-worker, his supervisor and his best friend. The DOE presented the testimony of the DOE consulting psychiatrist.

II TESTIMONY

1. The Individual

In his testimony the individual described the events surrounding his citation for “public affray.” He indicated that he received the citation on Halloween of 1999 when he was 21 years old. That evening he attended a party near his university. There was some pushing and shoving between friends. The incident was observed by the police who issued citations for “public affray” to a number of students. Transcript of Hearing (Tr.) at 18. One of the other students that received a citation went to the court and explained the situation. After that explanation all of the citations for “public affray” were dismissed. Tr. at 18.

The individual also testified about the circumstances surrounding the October 1998 minor in possession citation. He indicated that he had just arrived at a party and was holding a beer when the police arrived. Approximately 10 students were given citation for being minors in possession. Tr. at 22. He testified that he appeared in court, explained the situation and the charges were dismissed. Tr. at 22.

The individual testified that when he was filling out question 23 of the QNSP entitled “Your Police Record” he listed his two DWI arrests in response to sub-question d, which requested information on convictions related to alcohol. However, he failed to list the citations for minor in possession of alcohol or the citation for “public affray,” in response to sub-question f, which requested, inter alia, information on charges not otherwise listed. He testified that at the time he was filling out the QNSP, he believed the question requested information about arrests and it did not occur to him that the dismissed citations for “public affray” and minor in possession of alcohol should be disclosed in that section of the QNSP. Tr. at 48.

The individual then testified about his current consumption of alcohol. He testified that in the past, especially when he was in college, alcohol has been a problem for him. He testified that he was married in March 2003 and soon thereafter “I realized that my family and my child are more

important than alcohol, and if it takes refraining from alcohol totally, I'm going to do that, because that's what's more important to me." Tr. at 24. He testified that the last time he consumed alcohol was when his baby was born in August 2003. Tr. at 24. He indicated that he has no intention of consuming alcohol in the future. Tr. at 36.

2. The Individual's Sister

The individual's sister testified that she has a very close relationship with her brother and that they visit at least once a week. Tr. at 49. She testified that she has been to the individual's home on a number of occasions and that in the last year there has been no alcohol in the individual's home and she has not seen the individual consume any alcohol. Tr. at 50. She testified that since his marriage and the birth of his child he has become much more responsible. Tr. at 51.

3. The Individual's Brother in Law

The individual's brother in law testified that he has known the individual for 10 years. He testified that before the individual got married he would socialize with the individual once every other month and the individual would normally consume one or two beers. Tr. at 56. However, since his marriage and the birth of his child, the individual has stopped consuming alcohol and has become much more mature. He indicated the individual is focusing his life in a positive direction. Tr. at 56. He testified that there is no alcohol in the individual's home and that the individual knows that alcohol could be a problem for him. His brother in law believes the individual will not consume alcohol in the future. Tr. at 57.

4. The Individual's Supervisor

The individual's supervisor testified that he has known the individual as an employee for the year and a half that the individual has worked at the DOE site. Tr. at 61. He testified that the individual is a good employee.

5. Individual's Father in Law

The individual's father in law testified that he has known the individual for 3½ years. Tr. at 70. He testified that he sees the individual once or twice a week. Tr. at 72. He testified that his son in law is very respectful and family oriented. During the first several years he knew the individual he testified the individual would consume a beer or two around holidays or when on a fishing trip. Tr. at 70. However, he indicated that he has not seen the individual consume any alcohol in the 14 months since his child was born. Tr. at 71.

6. The Individual's Wife

The individual's wife testified that she met the individual in November 2001 and they have been very close since that time. Tr. at 82. She testified that they were married in March 2003 and their baby was born in August 2003. Before the birth of their child the individual consumed alcohol once

ever couple of months. Tr. at 84. She testified that her husband has not consumed any alcohol since their child was born in August 2003. Tr. at 82. She indicated alcohol has never been a problem in their relationship. Tr. at 85. She testified that alcohol is never going to be a part of their lives again. Tr. at 86.

7. Co-worker

The co-worker testified that he has known the individual as a co-worker for two years and that for a number of months he and the individual commuted 30 miles together. Tr. at 93. He testified the individual is a good worker and that he has never seen an indication that the individual consumes alcohol. Tr. at 95.

8. The Individual's Best Friend

The individual's best friend testified that he went to high school and college with the individual and they have been best friends since high school. Tr. at 138. He testified that when they were in college they often went to social events at which they consumed alcohol. Tr. at 139. Currently, he does not see the individual very often. He testified that he has been to the individual's house eight times and consumed alcohol with the individual on one of the visits. Tr. at 139. He testified that the individual told him that he has stopped consuming alcohol because his family is his first priority. Tr. at 139.

After the DOE consulting psychiatrist's testimony the individual's friend was recalled to clarify his testimony regarding when he consumed alcohol with the individual. He testified that about six months before the hearing he was invited to a barbecue at the individual's home. He brought beer to the barbeque. He clarified his original testimony by indicating that I "drank but I didn't mean to say that [the individual] drank." Tr. at 152.

9. The DOE Consulting Psychiatrist

The DOE consulting psychiatrist testified that he interviewed the individual in August 2003 before the birth of his child. At the time of the interview he was concerned by the individual's four alcohol related legal problems. He was especially concerned by the individual's two arrests for DWI. He pointed out that since the interview was two and a half years after the individual's last legal problem and all of the problems occurred when the individual was rather young, between the age of 18 and 22, his concern at the time of the interview was whether the individual's "drinking problem was persistent." Tr. at 100. During the interview the individual indicated that he was continuing to consume alcohol and he did not believe he had a problem with alcohol. The DOE consulting psychiatrist testified that the individual's statements indicating that he was currently consuming alcohol and that he did not perceive that he had an alcohol related problem combined with the individual history of four alcohol related legal problems was sufficient for a diagnosis of alcohol abuse. Tr. at 103. However, he testified that at the time of his evaluation he did not believe that the individual's problem was so serious that he required inpatient treatment. He believed a year of abstinence with weekly outpatient treatment would be sufficient to demonstrate rehabilitation. Tr. at 103.

The DOE consulting psychiatrist testified about the liver enzyme test results that the individual submitted. He testified that those results indicate the individual's enzyme levels were normal and indicate that the individual has not been consuming excessive amounts of alcohol in the last year. Tr. at 114.

The DOE consulting psychiatrist also provided testimony regarding his impressions of the testimony provided by the individual and his family members. He indicated that "the individual decided on his own, after seeing me and having the birth of his kid, that he was to stop." Tr. at 120. His impression after hearing the testimony is the individual "has decided that alcohol is a problem in his life, it sounds like he is committed to stopping drinking, sounds like he has changed somewhat since I saw him." Tr. at 121. He concluded by testifying that he thinks there is adequate evidence of rehabilitation, although he indicated it was a very close call. Tr. at 123.

III. REGULATORY STANDARD

In order to frame my analysis, I believe that it will be useful to discuss briefly the respective requirements imposed by 10 C.F.R. Part 710 upon the individual and the hearing officer. As discussed below, once a security concern has been raised, Part 710 clearly places upon the individual the responsibility to bring forth persuasive evidence concerning his eligibility for access authorization, and requires the hearing officer to base all findings relevant to his eligibility upon a convincing level of evidence. 10 C.F.R. §§ 710.21(b)(6), 710.27(b), (c), (d).

A. The Individual's Burden of Proof

It is important to bear in mind that a DOE administrative review proceeding under this Part is not a criminal matter, where the government would have the burden of proving the defendant guilty beyond a reasonable doubt. Once a security concern has been raised, the standard in this proceeding places the burden of proof on the individual. It is designed to protect national security interests. The hearing is "for the purpose of affording the individual an opportunity of supporting her eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a).

This is not an easy evidentiary burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring an access authorization. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of access authorizations indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of an access authorization). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. In addition to her own testimony, the individual in these cases is generally expected to bring forward witness testimony and/or other evidence which, taken

together, is sufficient to persuade the hearing officer that restoring access authorization is clearly consistent with the national interest. *Personnel Security Hearing (Case No. VSO-0002)*, 24 DOE ¶ 82,752 (1995).

B. Basis for the Hearing Officer's Decision

In a personnel security case under Part 710, it is my role as the hearing officer to issue a decision as to whether granting an access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. §710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). I must examine the evidence in light of these requirements, and assess the credibility and demeanor of the witnesses who gave testimony at the hearing.

IV. ANALYSIS

1. Criterion J Security Concern

As discussed below I have determined that the individual has resolved the security concerns regarding the diagnosis of alcohol abuse.

The testimony of his family members clearly indicated there has been a change in the individual's social activities and that his current life style does not include the consumption of alcohol. I was convinced by the testimony of the individual's witnesses that the individual has been abstinent since August 2003. Each of the witnesses described their interactions with the individual and each, with the exception of his best friend, testified that their observation and interactions with the individual indicate that he has not consumed alcohol since August 2003. I discount the best friend's initial statement that the individual consumed alcohol in the early part of 2004. My impression of his testimony was that he had a very limited recollection of specific events involving the individual. I believe that his testimony indicates that the individual and he have drifted apart as the individual's life style changed and the individual matured. In college and high school, the best friend knew the individual very well, but he no longer socializes with him on a regular basis. He was not a persuasive witness on the issue of the time and place when he last saw the individual consume alcohol. Therefore, I find that the totality of the testimony establishes that the individual has not consumed alcohol since August 2003.

I was convinced by the individual's witnesses and DOE consulting psychiatrist that the individual has recognized that he has a problem with alcohol. The testimony further indicates that the individual has developed a life style that focuses on family activities which do not include the consumption of alcohol. I also believe the testimony of the individual and his wife which indicates that in the future alcohol will not be a part of their lives. I therefore was convinced that the individual is committed to abstinence.

Therefore, I agree with the DOE consulting psychiatrist assessment that the individual has been rehabilitated from the Criteria J security concern.

2. Criterion F Security Concern

It is clear that individual failed to disclose on his QNSP the police citation he received for being a minor in possession of alcohol and for "public affray." Failure to disclose derogatory information on a QNSP is a security concern. The individual indicates he failed to provide the information because when he answered the question he focused on arrests and it did not occur to him that the DOE was asking about citations that were dismissed. The individual argues that the fact that he provided full information about the two DWI arrests indicates that he was in good faith providing unflattering information. The individual has indicated he will be more careful and complete in the future.

The individual failed to recognize that information about the two citations was required. However, those events took place some time ago at a different stage of the individual's life. See 10 C.F.R. §710.7(c). The fact that he readily provided full information about the DWI arrests at the time he completed the questionnaire indicates that he was willing to provide derogatory information when he was filling out his QNSP. I believe his failure to provide the citation information on his QNSP was a careless oversight that will not recur. Therefore, I am convinced that the individual will be candid with the DOE in the future. He has therefore mitigated the criterion F security concern.

VI. CONCLUSION

I have concluded that the individual has mitigated the DOE security concern under Criteria F and J of 10 C.F.R. § 710.8. In view of the record before me, I am persuaded that restoring the individual's access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. Accordingly, I find that the individual's access authorization should be restored.

The review procedures applicable to proceedings under Part 710 were revised effective September 11, 2001. 66 Fed. Reg. 47061 (September 11, 2001). Under the revised procedures, the review is performed by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

Thomas L. Wieker
Hearing Officer
Office of Hearings and Appeals

Date: November 23, 2004
: